**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RICKY KEELE	)	
Claimant	)	
	)	
VS.	)	
	)	
HAZ MAT RESPONSE, INC.	)	
Respondent	)	Docket No. 255,122
	)	
AND	)	
	)	
RELIANCE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant appealed Administrative Law Judge Robert H. Foerschler's Award dated January 29, 2002. The Board heard oral argument on August 6, 2002.

APPEARANCES

Richard C. Wallace of Shawnee, Kansas appeared for the claimant. Rex W. Henoch of Lenexa, Kansas appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge determined claimant failed to meet his burden of proof to establish timely notice of the alleged injury or that he suffered accidental injury arising out of or in the course of employment. Accordingly, the Administrative Law Judge entered an Award denying compensation.

Claimant raised the following issues on review: (1) whether the claimant met with personal injury by accident arising out of and in the course of employment with respondent; (2) whether the claimant gave timely notice of his injury; (3) nature and extent of claimant's disability, if any; (4) whether the claimant is entitled to reimbursement of medical expenses; and, (5) whether the claimant is entitled to unauthorized medical expense.

Conversely, the respondent argues the Administrative Law Judge's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Administrative Law Judge's Award sets out the findings in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own as if specifically set forth herein.

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.[1] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[2]

Briefly restated, the claimant alleged an injury to his shoulder while dismounting from a backhoe he had been operating on December 14, 1999, in the course of his employment with respondent. Claimant alleged a co-employee witnessed the incident and that at lunch he later told several other co-employees about the incident. All the co-employees testified and denied knowledge of claimant's work-related shoulder injury or that claimant had advised them of a work-related incident regarding his shoulder.

After this alleged incident the claimant was sent to a job site in Wichita and before he reported to work he requested permission to seek treatment for his shoulder. Claimant called respondent's office to see if such treatment would be covered by his health insurance. The finance manager for respondent, Jo Elaine Wilhite, testified:

Q. What did he tell you?

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[1] K.S.A. 44-501(a).

[2] K.S.A. 44-508(g).

A. He called in to see – he said that his shoulder was hurting, and he just couldn't handle the pain any longer. And he wanted to know if he would go to a doctor in Wichita if our health insurance would cover it.

Q. What did you tell him?

A. I asked him, did you just get hurt, did you get hurt on the job. And he said, no, I did it this weekend. He said, but I can't handle the pain anymore. And I told him if it was an emergency our insurance would pick it up, just go to the emergency room.[3]

In addition, the claimant's supervisor at the Wichita job site testified claimant requested permission to seek treatment for his shoulder but never attributed his shoulder problem to any work-related incident.

The finance manager's testimony coupled with the co-employees' testimony are more persuasive than claimant's assertions and contradictory testimony. The Board agrees with and adopts the Administrative Law Judge's conclusion claimant failed to meet his burden of proof to establish he suffered accidental injury to his shoulder arising out of and in the course of his employment.

An injured worker is required to provide respondent with notice of a work-related accident within 10 days or establish within 75 days just cause for not providing respondent with the 10-day notice. Additionally, the 10-day and the 75-day limitation does not apply if the employer was unavailable to receive notice.[4]

The claimant asserts that he advised his supervisor, John Negrete, of the accident. However, Mr. Negrete specifically testified claimant never reported a work-related accident nor requested an accident report be filled out. Although Mr. Negrete learned claimant was alleging a work-related shoulder injury, he testified he did not become aware of that allegation until weeks later.

The preponderance of the credible evidence supports the Administrative Law Judge's determination that claimant failed to provide respondent timely notice of the alleged shoulder injury as required by K.S.A. 44-520. Moreover, claimant did not allege nor prove there was any just cause for such failure.

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[3]Deposition of Jo E. Wilhite dated June 25, 2001, at 4-5.

[4]See K.S.A. 44-520.

The Board affirms the Administrative Law Judge's determination claimant neither provided timely notice nor met his burden of proof to establish accidental injury to his shoulder arising out of or in the course of employment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated January 29, 2002, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2002.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Richard C. Wallace, Attorney for Claimant
       Rex W. Henoch, Attorney for Respondent
       Robert H. Foerschler, Administrative Law Judge
       Director, Division of Workers Compensation